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IN THE UNITED STATES DISTRICT COURT

FOR THE

NORTHERN MARIANA ISLANDS

KENNETH COUTURE,	)	CV NO. 05-0024
	)	
Plaintiff,	)	
	)	
v.	)	<b>PLAINTIFF'S MOTION FOR</b>
	)	<b>SANCTIONS AGAINST DEFENDANTS</b>
	)	<b>PURSUANT TO FED.R.CIV.P. 37(c)(1)</b>
AMERICAN OVERSEAS MARINE)	)	
CORPORATION and GENERAL DYNAMICS)	)	
CORPORATION,	)	Date: April 5, 2007
	)	Time: 10:00 a.m.
Defendants.	)	Judge: Munson

**COMES NOW** Plaintiff Kenneth Couture, by and through his counsel of record, William Fitzgerald and Bruce Berline, and hereby moves this Court, pursuant to Fed.R.Civ.P. 37(c)(1) for sanctions consisting of an entry of default against Defendant General Dynamics Corporation and reasonable costs and attorney's fees against Defendants General Dynamics Corporation and American

1 Overseas Marine Corporation based on the Defendants deceitful conduct involving egregious violations  
2 of the federal discovery rules.

### 3 4 **FACTS**

5 In July of 2005, Plaintiff filed a complaint in this Court naming Defendants American Overseas  
6 Marine Corporation ("AMSEA") and General Dynamics Corporation ("Gen Dyn") (occasionally referred  
7 to collectively as "Defendants") as defendants liable for his injuries sustained on March 25, 2004 aboard  
8 the M/V 1<sup>st</sup> Lt. Jack Lummus. *See* Plaintiff's Original Complaint; *See also* Declaration of Bruce Berline  
9 ("Berline Decl.") at 1. AMSEA and Gen Dyn are large defense contractors who own and operate a fleet  
10 fo at least 26 different ships. *See* Deposition Transcript of Tammy Ducharme, page 66, lines 15-22  
11 attached as Exhibit "A" to the Berline Decl. Included within this fleet at the time of Mr. Couture's  
12 injury was the M/V 1<sup>st</sup> Lt. Jack Lummus.

13 Early on in this litigation, in September, 2005, shortly after Defendants answered Plaintiff's  
14 complaint, Plaintiff's counsel sent a meet and confer letter pursuant to Rule 26(f) of the Federal Rules  
15 of Civil Procedure. *See* Letter from Bruce Berline to David Ledger, dated September 3, 2005 attached  
16 as Exhibit "B" to the Berline Decl. This letter was sent out of Plaintiff's concern with Defendants'  
17 denials in their Answer to Plaintiff's complaint and requested the Defendants to clear up any confusion  
18 about several topics - one such topic being the inclusion of proper defendants in the lawsuit. In  
19 Plaintiff's Rule 26(f) letter, Plaintiff requested the Defendants admit that AMSEA was his employer or  
20 disclose who was at the time of his injury. *Id.* at page 3. Another section of the letter requested  
21 information on the identification of any entities who have any ownership interests in the Lummus and  
22 requested copies of any relevant charter agreements. *Id.*

1 In a September 22, 2005 letter, Defendants responded to Plaintiff's inquiries. *See* Letter from  
 2 David Ledger to Bruce Berline, dated September 22, 2005 attached to the Berline Decl. as Exhibit "C."  
 3 In response to Plaintiff's inquiry about Mr. Couture's employer, Defendants stated:

- 4  
 5 2. Employer. It is agreed that Mr. Couture's employer is a defendant who has been named,  
 6 served and appeared in the lawsuit.

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 8 *Id.* at page 1. In response to Plaintiff's inquiry as to ownership interests in the Lummus, Defendants  
 9 stated:

- 10 5. Vessel owner We understand that your concern over the identity of the  
 11 vessel/owner/operator/charterer is due to the claim alleging unseaworthiness. **It**  
 12 **is agreed that the entity which could be liable for damages proven to have**  
 13 **been caused by an unseaworthy condition or negligence has been named,**  
 14 **served and appeared in the lawsuit.**

15 *Id.* at page 2 (emphasis added). Satisfied that AMSEA and Gen Dyn were the proper defendants,  
 16 Plaintiff focused his time and resources in proving the causes of action against the liable parties: his  
 17 employer - AMSEA, and the owner of the Vessel - Gen Dyn. For nearly two years now, Plaintiff has  
 18 vigorously litigated this matter against AMSEA and Gen Dyn. Berline Decl. at 2. Over this period of  
 19 time, the parties engaged in extensive discovery. *Id.* The discovery consisted of the following:

20 *Depositions:*

- 21 1. Carl Inglehart - Medical Services Officer, two separate depositions  
 22 2. Plaintiff Couture - two separate depositions  
 23 3. Captain David Hagner - deposition taken in New Jersey  
 24 4. Tammy Ducharme - former AMSEA Chief of Insurance and Claims  
 25 5. Chief Mate Peter Kirk - Deposition taken in Hawaii  
 26 6. Doctor Peter Diamond - Defendant's medical expert  
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1           7.       Doctor Jerome Landstrom - Plaintiff's treating orthopedic surgeon

2           8.       Doctor Raymond Lucas - Defendant's medical expert

3 *Id.* In total, the parties have completed ten depositions. In addition, the parties exchange extensive  
4 written discovery in the form of interrogatories, requests for admissions and document requests.<sup>1</sup>

5           Through this extensive discovery process, Plaintiff has obtained admissions from the Defendants  
6 which conclusively prove that General Dynamics is the owner of the Lummus, that AMSEA is Plaintiff's  
7 employee, and that Plaintiff is a seaman entitled to bring Jones Act and unseaworthiness claims against  
8 each respective party, along with many others relevant facts. Berline Decl. at ¶ 7. So much so that, as  
9 stated in Defendant's memorandum in support of their summary judgment, Defendants' are considering  
10 offering Plaintiff a stipulation to "vicarious liability for the actions of the MSO and the harm, if any,  
11 stemming therefrom." *See* Defendants' Memorandum in Support of Motion for Summary Judgment, at  
12 12, n.4. All of these concessions, and more, were garnered as a result of this extensive and time  
13 consuming discovery with the Defendants.

14           Now, Defendants AMSEA and Gen Dyn, on the eve of trial, file a summary judgment seeking  
15 dismissal of Plaintiff's action on grounds, asserted by Defendants for the first time ever in this matter,  
16 that the Public Vessel Act ("PVA") and the Suit in Admiralty Act ("SAA") prohibit Plaintiff from suing  
17 the Defendants and limit his remedy to an action against the United States. *See* Defendants Motion for  
18 Summary Judgment, filed February 1, 2007. The catch to the Defendants' motion, however, is that the  
19 statute of limitations has expired for both the PVA and the SAA<sup>2</sup>. Thus, according to Defendants,  
20 Plaintiff, after expending all of this time, effort and money, is left without a remedy for his injuries.

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23           <sup>1</sup> A list of the written discovery propounded by the parties in this matter is attached as Exhibit  
24 "D" to the Berline Decl.

25           <sup>2</sup> The SAA and the PVA have two year statute of limitations. *Taghadomi v. United States*, 401  
26 F.3d 1080, 1090 n. 11 (9<sup>th</sup> Cir. 2005).

1 In support of the summary judgment motion, the Defendants filed an declaration given by Thom  
2 Merrell, the Vice President of AMSEA. *See* Declaration of Thom Merrell in Support of Defendants'  
3 Motion for Summary Judgment, filed on February 1, 2007 ("Merrell Decl."). Defendants have also  
4 produced a 74 plus page Bareboat Charter, a 145 plus page Time Charter for the Vessel, and a nearly 3  
5 inch thick MSC Standard Operating Procedure Manual. *See* exhibits B, C, and D attached to the Merrell  
6 Decl.

7 Defendants assert this defense despite never disclosing it to anyone in anyway at any time for  
8 nearly two years. Berline Decl. at ¶ 12. Defendants did not claim this defense in their answer, they  
9 never discussed it with this Court or the Plaintiff, they never listed any documents or the identified  
10 anyone that could be used to support such a defense in their Rule 26(a) mandatory disclosures, and they  
11 never supplemented their Rule 26(a) disclosures.

12 To begin with, Defendants filed their answer on August 29, 2005. *See* Defendants' Answer to  
13 Complaint attached as Exhibit "E" to the Berline Decl. The Defendants failed to cite to the PVA, the  
14 SAA or even mention the United States Government in their answer. *Id.* In fact under the "Defenses"  
15 section of the answer, Defendants specifically state that they intend to rely upon the defenses of waiver  
16 estoppel, unclean hands, statute of limitations and assumption of the risk. *Id.* at 5. Defendants also  
17 claimed that Plaintiff was barred from maintaining an action against his employer and the vessel because  
18 he was not a Jones Act Seaman and that the vessel was seaworthy. *Id.* at 4-5. Defendants did assert that  
19 Plaintiff's damages were caused solely by the negligence of third person and circumstances of that his  
20 injuries were caused by third persons over whom Defendants had no control. *Id.* at 5. However, as  
21 shown below, the Defendants denied such defenses were available to them in their responses to  
22 Plaintiff's interrogatories.

23 On August 29, 2005, this Court issued an Order Re: Case Management Conference. *See* Order  
24 Re: Case Management Conference, dated August 29, 2005 attached as Exhibit "F" to the Berline Decl.  
25 That August 29<sup>th</sup> Order stated, in pertinent part that each of the parties' attorneys "shall be present at the  
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1 Case Management Conference, prepared to discuss with the Judge of this Court the subjects hereinbelow  
2 outlined.” *Id.* Section (j) of that Order states “Any other matter which may be conducive to the just and  
3 efficient and economical determination of the proceedings . . .” *Id.* The Case Management Conference  
4 was held on September 20, 2005. Berline Decl. at ¶ 13. Defendants never brought up the issue that they  
5 were not the proper defendants. *Id.* Moreover, neither the PVA nor the SAA was ever mentioned or  
6 discussed at that conference. *Id.* Certainly, a claim that the United States is the only proper defendant  
7 and not AMSEA or Gen Dyn is something that “may be conducive to the just and efficient and  
8 economical determination of the proceedings.” *See* Exhibit “F.”

9 On October 11, 2005, Defendants filed their Initial Disclosures as required by this Court’s local  
10 rules and Rule 26(a) of the Federal Rules of Civil Procedure. *See* Defendants’ Initial Disclosures  
11 attached as Exhibit “G” to the Berline Decl. AMSEA and Gen Dyn never listed a Thom Merrell in their  
12 disclosure statement. *Id.* In fact, Plaintiff’s counsel has never heard of Mr. Merrell until his declaration  
13 was provided to Plaintiff in February of 2007. Berline Decl. at ¶ 15. Nor did the Defendants’ disclosure  
14 statement list any other AMSEA or Gen Dyn company official or United States official who possessed  
15 information that the Defendants could use to support a defense based upon the PVA or SAA. *See*  
16 Exhibit “G.” Nor did Defendants ever supplement their disclosure statement with such information, as  
17 required by Rule 26(e). *See* Fed.R.Civ.P. 26(e); Berline Decl. at ¶ 16. The only individuals that  
18 Defendants listed in their Initial Disclosures are: Captain Hagner, Chief Mate Dan Reed, 2<sup>nd</sup> A/E  
19 William Arnost, 1<sup>st</sup> A/E Charly Smith, Chief Mate Peter Kirk, MSO Karl Englehart and Donald Farmer.  
20 *See* Exhibit “G.”

21 The Defendants also failed to list, in their Initial Disclosures, or produce to Plaintiff, the Time  
22 Charter for the Vessel, the MSC Standard Operating Procedure Manual, or the Bareboat Charter - the  
23 only documents used by Defendants to provide support to their motion for summary judgment. *See*  
24 Exhibit “G”; Berline Decl. at ¶ 17. Defendants have never before referenced such documents in this  
25 matter. *Id.* And certainly, this is the first time Plaintiff has ever seen such documents. *Id.*

1 On January 11, 2007, Plaintiff served his First Set of Request for Production of Documents and  
2 Things upon Defendants' counsel. *See* Berline Decl. at ¶ 18. Among other requests for documents  
3 contained in Plaintiff's request, was the following three requests:

4 27. Any and all Documents upon which You intend to rely in support of Your claims and/or  
5 defenses in the above-captioned matter, and not otherwise produced in response to these  
6 Requests for Production.

7 29. Any and all Documents Defendants' intend to introduce into evidence at trial

8 30. Any and all Documents Defendants are relying on to defend this matter at trial.

9 Defendants chose to object to these requests instead of producing any documents such as the documents  
10 they now use for their summary judgment motion. *See* Defendants' Response to Plaintiff's First Set of  
11 Requests for Production of Documents and Things attached at Exhibit "H" to the Berline Decl.  
12 (Defendants' Response accurately quotes Plaintiff's original document requests).

13 On December 20, 2005, Plaintiff served his First Set of Requests for Interrogatories on  
14 Defendants' counsel. Berline Decl. at ¶ 21. Plaintiff's First Set of Requests for Interrogatories  
15 contained, among others, the following questions:

16 9. State each and every fact which supports Your contention that Plaintiff's injuries  
17 were either caused or contributed to by third persons over whom Defendants have no  
18 control or right of control, thus barring this action against Defendants as set forth in Your  
answer on page 5.

19 10. State each and every fact which supports Your contention that Plaintiff's damages  
20 were caused solely by the negligent superceding acts of . . . other persons and  
21 circumstances over which Defendant had no control or right of control as set forth in  
Your answer on page 5.

22 11. State each and every fact which supports Your contention that Defendants have  
23 a defense based on the doctrine of waiver.

24 12. State each and every fact which supports Your contention that Defendants have  
25 a defense based on the doctrine of estoppel.

1 13. State each and every fact which supports Your contention that Defendants have  
2 a defense based on the doctrine of unclean hands.

3 14. State each and every fact which supports Your contention that Defendants have  
4 a defense based on the statute of limitations.

5 16. Describe any and all administrative remedies which you contend Plaintiff should  
6 have exhausted in this matter.

7 17. State each and every fact which supports Your contention that Plaintiff has failed  
8 to exhaust administrative remedies.

9 *See* Defendants' Response to Plaintiff's First Set of Requests for Interrogatories attached at Exhibit "I"  
10 to the Berline Decl. (Defendants' Response accurately quotes Plaintiff's original interrogatories). The  
11 Defendants' answer to each of these questions was the same - "At this time, none," or, as to the answer  
12 to interrogatory no. 10 - "[w]ith regard to acts attributable to other persons, none at this time." *See*  
13 Exhibit "I" (emphasis added).

14 Despite establishing many, if not all, of the relevant facts in this case through this extensive  
15 discovery, Defendants have never seriously discussed settlement with the Plaintiff. Berline Decl. at ¶  
16 24. Plaintiff, on the other hand, has provided Defendants' with two separate written settlement offers,  
17 the last offer being made on October 16, 2006. *Id.* at ¶25. However, Defendants have never provided  
18 Plaintiff with a written offer or even made a counter-offer. *Id.* at 26. In an e-mail to Plaintiff, Defendants  
19 explained that their refusal to negotiate with Plaintiff was because he remains employed on the Lummus  
20 and any settlement amount would become known to the crew of the vessel and it would cause a whole  
21 host of problems for the Defendants. *See* e-mail from Defendants' Counsel to Plaintiff's Counsel, dated  
22 August 4, 2006 attached as Exhibit "J" to the Berline Decl. For these reasons, the settlement conference  
23 scheduled by this Court's Case Management Order was eventually taken off calendar "until the parties  
24 determine that such talks may result in a resolution of the matter." *See* Stipulation to Continue  
25 Settlement Conference, attached as Exhibit "K" to the Berline Decl. Presumably, these same reasons  
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3 explain why, on September 22, 2006, Defendants' declined this Court's invitation to discuss settlement  
4 during a chamber conference after this Court granted Defendants' request to continue the trial. See  
5 Berline Decl. at ¶ 29.

6 Curiously enough, Defendants settlement attitude has changed drastically after preparing the  
7 motion for summary judgement. In January, 2007, Defendants provided Plaintiff's counsel with a pre-  
8 filing copy of Defendants' motion for summary judgment. Berline Decl. at ¶30. Along with the copy  
9 of the motion, the Defendants sent an e-mail which stated, in pertinent part, that:

10 [we] request that your client reconsider his settlement position. Our clients are willing  
11 to consider a settlement offer which takes into account the option that, should the court  
12 grant the motion, your client will recover nothing. We do not consider your client's  
previous offer of \$175,000 to be such an offer.

13 See e-mail from Defendants' Counsel to Plaintiff's Counsel, dated January 8, 2007, attached as Exhibit  
14 "L" to the Berline Decl. Plaintiff declined Defendant's invitation to make an offer of settlement.  
15 Berline Decl. at ¶ 32. Despite being told that Plaintiff was proceeding to trial and no longer had an  
16 interest in settling this matter (Berline Decl. at ¶ 33), Defendants now insist on a settlement conference  
17 so that they can attempt to take advantage of their perceived advantage gained through deceit and  
18 egregious violation of the discovery rules. In fact, Defendants have gone so far as requesting this Court  
19 to compel Plaintiff's attendance at the settlement conference. See Defendants' Ex Parte Motion to  
20 Compel Plaintiff's Attendance at Settlement Conference, filed March 8, 2007. The Defendants' sudden  
21 attitude change toward settlement is no coincidence. The Defendants have intentionally mislead Plaintiff  
22 in order to put him in an extremely difficult position and to "interfere with his ability to proceed to trial"  
23 and undermine a rightful decision of this case. See *Wiltec Guam, Inc., v. Kahaluu Construction Co.,*  
24 *Inc.*, 857 F.2d 600, 603 -604 (9<sup>th</sup> Cir. 1988) *infra*. Moreover, in furtherance of the Defendants' deceitful  
25 tactics, they have wilfully and egregiously violated the rules of discovery in order to conceal their tactics  
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from Plaintiff until the statute of limitations ran.

## ARGUMENT

### I. RULE 26(A) MANDATES DISCLOSURE OF CERTAIN INFORMATION.

The Federal Rules of Civil Procedure “shall be construed and administered to secure the just, speedy and inexpensive determination of every action.” Fed.R.Civ.P. 1. One mechanism the Federal Rules of Civil Procedure uses to achieve this goal is through mandatory disclosures pursuant to Rule 26. Rule 26(a) of the Federal Rules of Civil Procedure mandates the automatic disclosure of certain information without the necessity of any formal or informal request by an opposing party. See Fed R. Civ. P. 26(a). Pertinent to this motion are the categories of mandatory information listed in Rule 26(a)(1)(A) and (B).

Rule 26(a)(1)(A) requires the automatic disclosure of:

the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses unless solely for impeachment, identifying the subjects of the information.

Rule 26(a)(1)(B) requires the automatic disclosure of:

a copy of, or a description by category and location of, all documents, data compilations and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

#### A. *The Mandatory Disclosure Provision under Rule 26(a) Encompass the Witness and Documents Defendants Use to Support their Summary Judgment.*

Rule 26(a)(1)(A) and (B) mandates the disclosure of information “that the disclosing party may use to support its claims or defenses. . .” The Advisory Committee’s notes to 26(a)(1)(A) and (B) defines the term “Use” to include “ any use at a pretrial conference, to support a motion or at trial.” See

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3 Fed.R. Civ.P. 26 advisory committee's note, 2000 amendment, subdivision (a)(1). Certainly, the  
4 Defendants' use of the evidence supporting their summary judgment motion fits squarely within the Rule  
5 26(a)(1)'s scope of mandatory disclosure. The evidence used by Defendants to support their allegations,  
6 made in the motion for summary judgment, that they are not a proper party to this litigation, along with  
7 any other evidence which may support such allegations, were required by the discovery rules to be  
8 disclosed to Plaintiff at the beginning of this litigation - nearly two years ago.

9 **B. *Defendants Failed to Disclose Any Information Used to Support Their***  
10 ***Summary Judgment to Plaintiff.***

11 Here, AMSEA and Gen Dyn provided Plaintiff with their Initial Disclosures, pursuant to Fed.  
12 R.Civ. P26(a)(1) and this Court's local rule LR 16.2CJ(d) on October 11, 2005. See Exhibit "G." For  
13 the purposes of satisfying the disclosure mandates of Rule 26(a)(1)(A), the Defendants provided a list  
14 of the crewmen serving aboard the M/V 1<sup>st</sup> Lt. Jack Lummus and listed the following names: Captain  
15 Hagner, Chief Mate Dan Reed, 2<sup>nd</sup> A/E William Arnost, 1<sup>st</sup> A/E Charly Smith, Chief Mate Peter Kirk,  
16 MSO Karl Englehart and Donald Farmer. *Id.* The Defendants also included "[a]ll health care providers  
17 who have treated the plaintiff." *Id.* at page 2. Thom Merrill was not listed in Defendants' Initial  
18 Disclosures, nor was any other AMSEA or Gen Dyn company official. *Id.* Moreover, the Defendants  
19 failed to list anyone representing the United States. *Id.*

20 To satisfy the mandates of Rule 26(a)(1)(B), the Defendants attached a myriad of documents to  
21 their Initial Disclosures. These documents consisted mainly of invoices, medical records and crew lists  
22 relevant to the voyage upon which Plaintiff Couture was injured and the injury itself. Berline Decl. at  
23 ¶ 34. None of these documents that the Defendants now use to support their motion for summary  
24 judgment, the Bareboat Charter, the Time Charter nor the MSC operating manual, were attached to the  
25 Initial Disclosures. *Id.* at ¶ 35. Plaintiff was not provided these documents until February 16, 2007  
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3 when they served with the motion for summary judgment. *Id.* at ¶ 36. In fact, because the Defendants  
4 deemed these documents strictly confidential, Defendants' filed them with this Court under seal and  
5 required Plaintiff to agree to keep the documents confidential in order to review them. See Defendants'  
6 Ex Parte Motion Allowing Defendants to File Under Seal, filed February 5, 2007; Berline Decl. at ¶ 37.

7 Rule 26(f) requires a party to supplement initial disclosures "if the party learns that in some  
8 material respect the information disclosed is incomplete or incorrect" and this information "has not  
9 otherwise been known to the other parties during the discovery process or in writing." Fed.R.Civ.P.  
10 Rule 26(f)(1). Defendants never supplemented their initial disclosures with any information relevant  
11 to the allegations made in their motion for summary judgment. Berline Decl. at ¶ 38.

12 Despite failing to comply with Rule 26(a)(1)(a), failing to supplement the initial disclosures, and  
13 failing, otherwise, to disclose Mr. Merrell to the Plaintiff, the Defendants now use his testimony to  
14 support their motion for summary judgment - a motion purposefully timed to make it appear that  
15 Plaintiff will be left without a remedy in order interfere with his ability to proceed to trial and to coerce  
16 a settlement from him.

17 Similarly, the Defendants now produce the Bareboat Charter, the Time Charter and the MSC  
18 Operating Manual in support their motion for summary judgment. And just like Mr. Merrell's  
19 information above, Defendants have failed to disclose a copy, or even a description of these documents  
20 in its Initial Disclosures until now, after nearly two years of litigation. Berline Decl. at ¶ 17.

21 Certainly, as giant defense contractors leasing ships to the United States military, AMSEA and  
22 Gen Dyn is well versed in the applicability of the PVA and the SAA. Clearly, AMSEA and Gen Dyn  
23 knew full well about any potential application of these laws at the time Plaintiff served his complaint  
24 upon the Defendants. Thus, Defendants cannot be excused in any way from failing to disclose this  
25 information in their initial disclosures or, at a bare minimum, through supplementation of their  
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disclosures pursuant to Rule 23(e). Accordingly, there is no question that Defendants have wilfully and egregiously violated Rule 26(a)(1) and Rule 23(e).

**II. RULE 37 PROVIDES THE APPROPRIATE SANCTIONS FOR VIOLATIONS OF RULE 26.**

Rule 37 sanctions exist “to punish evasion of pretrial discovery.” *Wanderer v. Johnston*, 910 F.2d 652, 656 (9<sup>th</sup> Cir. 1990)(quotations and citation omitted). Rule 37(c)(1) provides sanctions for Defendants’ failure to disclose information mandated by Rule 26(a)(1). Rule 37(c)(1) states that:

[a] party that without substantial justification fails to disclose information required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence ... any witness or information not so disclosed.

In addition to the exclusion sanction, Rule 37(c)(1) permits the court to “impose other appropriate sanctions” and includes “the payment of reasonable expenses, including attorney’s fees, caused by the failure” and “sanctions authorized under Rule 37(b)(2)(A), (B) and (C).” Fed.R.Civ.P. 37(c)(1). Accordingly, Rule 37(c)(1), because it includes sanctions under Rule 37(b), provides a broad range of sanctions for a party’s violation of Rule 26(a)’s mandatory disclosure provisions. As stated in *United States v. Sumitomo Marine and Fire Ins. Co. Ltd.*, 617 F.2d 1365, 1369 (9<sup>th</sup> Cir. 1980)<sup>3</sup>, under Rule 37(b):

In ascending order of harshness, the district court may: require the delinquent party or his attorney to pay the reasonable expenses, including attorney's fees, incurred by the innocent party as a result of the failure to obey the order; strike out portions of pleadings; deem certain facts as established for purposes of the action or preclude admission of evidence on designated matters; dismiss all or part of the action; or render a default judgment against the disobedient party.

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<sup>3</sup> In *United States v. Sumitomo Marine and Fire Ins. Co. Ltd.*, a party failed to obey pre-trial orders of the district court, as opposed to here, the failure to disclose mandatory information; however, Rule 37 punishes both types of conduct.

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3       ***A. Defendants Wilful and Egregious Discovery Violations Warrant the Most Severe***  
4       ***Sanctions under Rule 37(b).***

5       Rule 37(b)(2)(C) allows, in pertinent part, a court to “render[] a judgment by default against the  
6       disobedient party.” This Court has “considerable discretion to impose the extreme sanction of dismissal  
7       or default where there has been flagrant, bad faith disregard of discovery duties.” *Wanderer v. Johnston*,  
8       910 F.2d 652, 655-56 (9<sup>th</sup> Cir. 1990) *citing* *National Hockey League v. Metro Hockey Club, Inc.*, 427  
9       U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976). Defendants’ discovery violations in this  
10      matter are especially egregious. The Defendants’ failure to disclose supporting information pertaining  
11      to the allegations in their summary judgment are an intricate part of their plan to prejudice, severely,  
12      Plaintiff by withholding information or providing misleading information in order to prevent Plaintiff  
13      from proceeding to trial and, instead, coerce a settlement. Because of Defendants “flagrant, bad faith  
14      disregard of discovery duties” (*Id.*), the only appropriate sanction is to order the default of General  
15      Dynamics under Rule 37(b)(2)(C).

16      Here, in September of 2005, Plaintiff asked Defendants if they were the proper parties in this  
17      lawsuit. Defendants affirmatively agreed, in writing, that they were the correct defendants. See Exhibit  
18      “C.” Relying on Defendants’ affirmative representations, Plaintiff set aside his concerns about the  
19      proper defendants in this matter and focused his time and resources in proving the causes of action  
20      against his employer, AMSEA, and the owner of the Vessel, Gen Dyn.

21      After substantiating many of the needed facts to support Plaintiff’s claims through extensive  
22      discovery, he offered to settle the matter with the Defendants. Berline Decl. at ¶ 25. However,  
23      Defendants surprisingly refused to participate in any reasonable negotiations or attend a settlement  
24      conference providing excuses such as the risk of a flood of baseless complaints against them if they  
25      settled this matter. See Exhibit “J.” Instead, Defendants required Plaintiff to continue to litigate this  
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3 matter until the statute of limitations ran against the United States - the party that Defendants now  
4 contend holds Plaintiff's exclusive remedy.

5 After Defendants filed their summary judgment motion, Plaintiff sent a terse letter to the  
6 Defendants stating that their motion is frivolous and requesting the withdrawal of the motion. See Letter  
7 from William M. Fitzgerald to counsel for Defendants, dated February 26, 2007 attached as Exhibit "M"  
8 to the Berline Decl. Defendants refused to do so. Berline Decl. at ¶ 39. Instead, the Defendants request  
9 this Court to calendar a settlement conference and compel Plaintiff's attendance so that they could  
10 follow through with their plan and attempt to coerce Plaintiff into settling by threatening him with an  
11 impending dismissal pursuant to the PVA and SAA. Defendants' tactics and conduct are replete with  
12 bad faith and constitute an egregious violation the Federal Rules of Civil procedure and the spirit of fair  
13 but zealous litigation. Accordingly, Plaintiff is requesting this Court to enter General Dynamic's default  
14 in this matter as a sanction for their deceit, and for their willful, egregious and continuous violation of  
15 Rule 26.

16 To determine if such a sanction of default under Rule 37(b)(2)(C) is appropriate, a court must  
17 consider the following five factors: "(1) the public's interest in expeditious resolution of litigation; (2)  
18 the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the  
19 public policy favoring disposition of cases on their merits; and (5) the availability of less drastic  
20 sanctions." *Wanderer v. Johnston*, 910 F.2d at 656 (citations omitted).

- 21 1. *The Public's Interest in Expeditious Resolution of Litigation and the Court's*  
22 *Need to Manage its Docket.*

23 These two factors favor the entry of default against the Defendants. See *Wanderer v. Johnston*,  
24 910 F.2d 652, 656, (9<sup>th</sup> Cir. 1990) ("The first two factors favor the imposition of sanctions in most  
25 cases"). If Defendants are not punished with a default judgment, then there will be another substantial  
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3 delay in bringing this action to trial. This matter has been litigated for nearly two years. The original  
4 trial date was calendared for August 28, 2006. *See* Exhibit “F.” By stipulation, the parties agreed to  
5 continue the trial date to November 27, 2006. *See* Order Granting Stipulation Extending Case  
6 Management Deadlines, filed June 12, 2006. Thereafter, the trial date was continued to April 9, 2007,  
7 at the behest of the Defendants because they insisted that their material witnesses, Captain David Hagner  
8 and Chief Mate Kirk, be available for trial. Berline Decl. at ¶ 40; *See also* the Amended Case  
9 Management Scheduling Order attached as Exhibit “N” to the Berline Decl. Now, after aggressively  
10 defending this matter, completing discovery and continuing the trial date, Defendants now file a motion  
11 for summary judgment claiming that the PVA and/or the SAA relieves them of liability in this matter  
12 and requests that this Court dismiss them from the case.

13 In response, Plaintiff Couture has filed an opposition to the Defendant’s Motion for Summary  
14 Judgment and has also filed a Rule 56(f) motion for a continuance of discovery. If this Court feels the  
15 summary judgment has any merit at all, for reasons asserted in Plaintiff’s Rule 56(f) motion, he should  
16 be allowed to take the deposition of Thom Merrell, and depose, for the second time, Captain Hagner,  
17 Chief Mate Kirk and Tammy Ducharme in order to resist Defendants’ assertion that the United States  
18 had operational control over the Lummus. Additionally, Plaintiff should be allowed to file his own  
19 summary judgment to show that as a matter of law, neither the PVA or the SAA apply in this case.  
20 Moreover, Plaintiff should be able to depose the appropriate persons to establish that the United States  
21 had timely notice in order to amend his complaint and add the United States as a party. Assuming  
22 *arguendo* that the United States is brought into this action, the parties will have to start from the  
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3 beginning.<sup>4</sup> Accordingly, there can be no dispute that seeking this additional discovery would, once  
4 again, result in “serious disruptions” of this Court’s trial schedule. *See Wiltec Guam, Inc., v. Kahaluu*  
5 *Construction Co., Inc.*, 857 F.2d 600, 603 -604 (9<sup>th</sup> Cir. 1988) (“[C]ases in which we have upheld orders  
6 of dismissal have often involved serious disruptions of the district court’s trial schedule”); *Malone v.*  
7 *U.S. Postal Service*, 833 F.2d 128, 131 (9<sup>th</sup> Cir. 1987). (Plaintiff’s “dilatory conduct greatly impeded  
8 resolution of the case and prevented the district court from adhering to its trial schedule”); *Thompson*  
9 *v. Housing Authority*, 782 F.2d 829, 831-32 (9<sup>th</sup> Cir. 1986)(Plaintiff’s conduct required continuing  
10 pretrial conference three times).

11 2. *The Risk of Prejudice to the Party Seeking Sanctions.*

12 The risk of prejudice is a key element that is essential to this Court’s analysis. *Wanderer v.*  
13 *Johnston* 910 F.2d at 656. “This factor requires an evaluation of whether the innocent party has been  
14 prejudiced. Prejudice in this context, is defined as whether [the Defendants’] actions impaired [Plaintiff  
15 Couture’s] ability to go to trial or threatened to interfere with the rightful decision of the case.” *Fargo*  
16 *Pacific Inc. v. Imamura*, 1997 WL 208983 (D. Guam) at \*5 (citing *Wiltec Guam, Inc., v. Kahaluu*  
17 *Construction Co., Inc.*, 857 F.2d at 604). Defendants here are large sophisticated defense contractors  
18 who are in the business of time chartering multi-million dollar vessels to the United States and are  
19 represented by knowledgeable maritime lawyers. It is absurd to think that Defendants suddenly  
20 discovered the PVA and the SAA after they gave written confirmation to Plaintiff that they were indeed  
21 the proper defendants in this litigation. And even if Defendants advance such an absurd notion, they  
22 still failed to supplement their disclosures under Rule 23(e) at the time they “discovered” the statutes.  
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25 <sup>4</sup> If this hypothetical indeed becomes reality, Plaintiff will ask this Court to award attorney’s fees  
26 and costs for all the work done to date by Plaintiff’s attorneys as additional sanctions against the  
27 Defendants.  
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3 No other conclusion may be reached other than the Defendants purposefully misled Plaintiff into  
4 believing that he had sued the correct defendants, and then Defendants intentionally violated Rule 26(a)  
5 in order to prevent Plaintiff from thinking otherwise. All the while, Defendants were patiently laying  
6 in wait for the statute of limitations against the United States to expire. Once the PVA and SAA's two  
7 year statute of limitations expired, Defendants filed their summary judgment asserting that, pursuant to  
8 the PVA and SAA, the United States is the only viable defendant. Defendants have attempted to leave  
9 Plaintiff without a remedy through active deception and willful withholding of information. There is no  
10 greater prejudice than this.

11 Clearly, Defendants' intended to impair Plaintiff's "ability to proceed to a trial" and to "interfere  
12 with the rightful decision of the case" (*Wiltec* at 604) by: (1) agreeing with Plaintiff that they were the  
13 correct defendants, and (2) withholding information which might possibly contradict such agreement  
14 in order to lead Plaintiff down a road that leads to nowhere. Defendants allowed Plaintiff to expend  
15 tremendous resources and time litigating against them, with Defendants all along resisting any kind of  
16 settlement talks or negotiations. Now that the statute of limitations against the United States have  
17 lapsed, suddenly Defendants produce reams of previously undisclosed documents along with an  
18 undisclosed witness in support of a summary judgment that threatens to leave Plaintiff with no remedy  
19 at all.

20 If there is any doubt left about Defendants' intentional bad faith in this matter, that doubt is  
21 dispelled by Defendants' newly found interest in settling this matter. For the first time ever, Defendants  
22 are not only requesting to settle with Plaintiff, they are demanding it. Defendants sent an e-mail to  
23 Plaintiff, along with their draft summary judgment, requesting that Mr. Couture "reconsider his  
24 settlement position." *See* Exhibit "L."

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3 The e-mail further stated that the Defendants:

4           request that your client reconsider his settlement position. Our clients are  
5           willing to consider a settlement offer which takes into account the option  
6           that, should the court grant the motion, your client will recover nothing.  
7           We do not consider your client's previous offer of \$175,000 to be such an  
8           offer.

9 *Id.* Defendants' change in attitude is no coincidence. A settlement conference is vital to the Defendants'  
10 scheme because it allows them to directly threaten Plaintiff with a possible dismissal of his case should  
11 he not accept their offer.

12           In response, Plaintiff declined to accept Defendants' coerced offer, stating in essence that, at this  
13 juncture, Plaintiff is proceeding to trial and that there would be no more settlement offers. Berline Decl.  
14 at ¶ 33. As could be predicted, Defendants were not swayed by Plaintiff's refusal to negotiate, they  
15 simply applied to the Court and demanded a settlement conference. And when Defendants found out  
16 that Plaintiff would not agree to personally attend the settlement conference, they, of course, were forced  
17 to ask this court to order Plaintiff's personal appearance. *See* Defendants' Ex Parte Motion to Compel  
18 Plaintiff's Attendance at Settlement Conference, filed March 8, 2007. There simply can be no doubt as  
19 to Defendants' egregious and intentional bad faith in this case. Nor can there be any doubt that such bad  
20 faith has clearly impaired Plaintiff's "ability to proceed to a trial and threatens to interfere with the  
21 rightful decision of the case." *Wiltec Guam, Inc., v. Kahaluu Construction Co., Inc.*, 857 F.2d at 604.

22           D.       *Public Policy of Deciding Matters on their Merits.*

23           This element "cuts against a default or dismissal sanction" *Wanderer v. Johnson*, 910 F.2d at  
24 656. However, here, this element is heavily outweighed by the first three factors. Moreover, under these  
25 circumstances, this element should be given little or no weight by this Court because here, Defendants  
26 themselves are trying to avoid a trial on the merits. A trial that would present evidence of Defendants'  
27 clear liability to a jury. In place of a fair trial, Defendants have attempted to prejudice Plaintiff in order  
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3 to force him to settle. Certainly, public policy was not meant to protect or condone this sort of bad  
4 behavior.

5 *E. Availability of Lesser Sanctions.*

6 Another key factor is the availability of lesser sanctions. *Wanderer v. Johnson*, 910 F.2d at 656.  
7 “As a general rule, a district court must consider less severe alternatives and discuss them if it elects to  
8 dismiss.” *Wiltec Guam, Inc., v. Kahaluu Construction Co., Inc.*, 857 F.2d at 604(citations omitted).  
9 However, although this is the preferred course of action, the Ninth Circuit has “never held that explicit  
10 discussion of alternatives is *necessary* for an order of dismissal to be upheld.” *Malone v. United States*  
11 *Postal Service*, 833 F.2d 128, 132. Thus, in “exceptional cases,” meaning those cases presenting  
12 “egregious circumstances,” “where it is clear no other alternative would have been reasonable,” the  
13 district court may enter a default without such a discussion of lesser sanctions. *Wiltec Guam, Inc., v.*  
14 *Kahaluu Construction Co., Inc.*, 857 F.2d at 604. Defendants conduct constitutes an especially  
15 egregious example of discovery abuse and as such no discussion of less drastic sanctions is needed.  
16 Nothing less than an entry of default will adequately punish Defendants for their dishonest and egregious  
17 conduct and no other sanction will rectify the damage done to Plaintiff’s case.

18 CONCLUSION

19 After considering Defendants’ egregious conduct and properly weighing the above five factors,  
20 Defendants’ default is clearly warranted in this matter. Defendants have purposefully deceived Plaintiff.  
21 They have wilfully, in bad faith, violated the discovery rules, specifically Rule 26, in order to gain an  
22 unjust advantage over Plaintiff, forcing him to forego a trial on the merits and instead severely  
23 compromise his action through a coerced settlement. For the above stated reasons, this Court should  
24 severely punish Defendants for their outrageous and particularly egregious behavior by entering a default  
25 against General Dynamics Corporation and awarding costs and reasonable attorney’s fees to Plaintiff’s  
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3 counsel for the time incurred in opposing Defendants' motion for summary judgment, for drafting  
4 Plaintiff's Rule 56(f) motion and for bringing this motion for sanctions.  
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6 Dated this 9<sup>th</sup> day of March, 2007  
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10 //S//  
11 BRUCE BERLINE  
12 WILLIAM M. FITZGERALD  
13 Attorneys for Plaintiff  
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